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In the Supreme Court

of the

United States

OCTOBER TERM, 1964

No. 395

THE HONORABLE JAMES M. CARTER, Judge of the United States District Court of the Southern District of California, Southern Division, et al.,
Petitioners,

vs.

OLYMPIC REFINING COMPANY, a corporation, and the UNITED STATES OF AMERICA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled cause, reversing the judgment of the District Court for the Southern District of California, Central Division.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 190-196) are on pages vii to xii of the Appendix. The oral opinion of the District Court (R. 344-347) is at pages iii to vi of the Appendix. The opinion of the Court of Appeals (R. 412-421) is at pages xiii to xxiii of the Appendix, and is reported in 332 F.2d 260.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on May 19, 1964 (R. 411, 412). Jurisdiction of this Court is invoked under section 1254(1) of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Did the Court of Appeals have jurisdiction to review the order of the District Court in view of the provisions of the Expediting Act (c. 544, 32 Stat. 823; 15 U.S.C. 29) conferring exclusive jurisdiction on this Court in civil antitrust cases brought by the United States?

2. Did the District Court have discretionary power to enter and continue in effect in a Government civil antitrust case protective orders which deny access by the public generally, and by a private antitrust plaintiff specifically, to pretrial documents filed by the Government?

STATUTES INVOLVED

The principal statutes involved are the Expediting Act of 1903 (c. 544, 32 Stat. 823; 15 U.S.C. 29) and the Publicity in Taking Evidence Act of 1913 (c. 114, 37 Stat. 731; 15 U.S.C. 30). These statutes and the pertinent portions of other statutes and rules involved are set out in the Appendix at pages i-ii.

STATEMENT OF THE CASE

The present controversy is a final chapter in *United States v. Standard Oil Company of California, et al.* (S.D. Cal., Civil 11584-C), a civil antitrust suit brought by the Government in 1950 (R. 59). The complaint, filed under section 4 of the Sherman Act (c. 647, 26 Stat. 209; 15 U.S.C. 4), charged seven oil companies and an association of crude oil producers[1] with having violated the Sherman Act since 1936 in the production, transportation and refining of crude oil and in the transportation, distribution and sale of refined petroleum products in the five western states (R. 59-132). The findings of the District Court, accepted without question by the court below, set out the sequence of events which followed the filing of this suit (Appx. pp. vii-xii; R. 190-196).

Soon after the complaint was filed, the Government served on each defendant over 200 interrogatories, with many subdivisions, inquiring into virtually every aspect of its business over a 14-year period (Appx. p. viii; R. 271). Defendants interposed numerous objections, but withdrew them upon obtaining the Government's assurance that it would hold the interrogatory answers in confidence until such time as the court otherwise ordered (Appx. pp. viii-xi).

This informal understanding was later embodied in an order by Judge Carter, stipulated to by the Government and defendants, which provided that the interrogatory answers of plaintiff, as well as those of defendants, would be held in confidence by the parties (Appx. p. ix; R. 133-137). The Government's answers to the defendants' interrogatories,

1. The defendants, who with the Honorable James M. Carter are petitioners herein, were Standard Oil Company of California, Socony Mobil Oil Company, Inc., formerly General Petroleum Corporation, Richfield Oil Corporation, Tidewater Oil Company, Texaco Inc., Shell Oil Company, Union Oil Company of California, and the Conservation Committee of the California Oil Producers.

which set out the contentions of Government counsel as to how the charges of the complaint could be sustained in fact and in law, referred to much of the information which defendants had voluntarily supplied under the earlier informal agreement (Appx. p. x; R. 149, 273).[2] A second protective order was later entered, this time on motion of defendants over the Government's opposition, which directed the clerk to hold the Government's interrogatory answers under seal, they having been filed in connection with questions as to their sufficiency (Appx. p. x; R. 138-139). After full disclosure by all parties of their respective factual and legal contentions, the progress of defining and limiting the issues in pretrial conference began. It was understood, of course, that evidence would be admitted at the trial only on those issues finally settled between the parties (Appx. pp. x-xi).

This step in pretrial was in its early stages when the case was settled as to six of the seven defendants by consent decree (Appx. p. xi). Simultaneously with the entry of the decree, Judge Carter entered a third protective order, this time on motion by the Government (Appx. pp. xi-xii; R. 140-141). It directed the consenting defendants to deliver to the Government the original copies of their interrogatory answers, and prevented the Government from publicly disclosing the answers except during the trial of the case as to the one nonconsenting defendant, Texaco Inc. (Appx. pp. xi-xii; R. 140-141). On March 7, 1961, the Government on stipulation dismissed the action as to Texaco, thus bringing the case to an end (Appx. pp. xi-xii; R. 232).

Four years after the consent decree had been entered, a private antitrust plaintiff (Olympic Refining Company)

2. The court below was under the impression that defendant *companies* had access to the interrogatory answers of each other (App. p. xxii). This is not true. Only counsel have been permitted to see the answers (R. 273-274).

made a demand by subpoena on the Government for access to its answers to the defendants' interrogatories (Appx. p. viii; R. 144). Defendants urged the Government to oppose the subpoena on the ground that discovery in the case was held under protective orders which, in the public interest, should be respected (R. 168-169). Instead, the Government filed a motion in the case requesting Judge Carter to vacate all three of the orders (Appx. p. vii; R. 145-156). Olympic was permitted to file written memoranda and present oral argument in support of the Government's motion (Appx. pp. vii, xvi; R. 157, 174, 288).

On September 26, 1963, Judge Carter delivered his oral opinion denying the Government's motion (Appx. pp. iii-vi; R. 344-347) and later entered his findings of fact and conclusions of law (Appx. pp. vii-xii; R. 190-196). The entry and continuation of the protective orders, he found, furthered "the congressional policy of encouraging the consent settlement of complex antitrust suits as well as the policy of encouraging full disclosure of all facts pertaining to such suits" (Appx. p. xii). From them came "the advantages to all concerned from the complete disclosure" through discovery; their continuance "formed an important part of the consideration which * * * defendants obtained in entering the consent decree" (Appx. p. xi). The benefits thus derived, he held, were paramount to the general policy that court proceedings should be open where, as here, the information under seal which Olympic sought was not evidence in any sense of the word (Appx. pp. iv-vi, x, xii). He advised counsel for Olympic (Appx. p. vi):

> "* * * this matter that is being kept from your view is not evidence * * * it is contentions, it is theories, it is arguments. It is not evidence. No documents are being sealed, no evidence you could use in court is being denied you."

Shortly after entry of the order denying the Government's motion, Olympic Refining Company filed an application with the United States Court of Appeals for the Ninth Circuit for leave to file a petition for a writ of mandamus directing Judge Carter to vacate the protective orders (Appx. p. xvi; R. 2-196). The Court of Appeals granted leave and gave permission to the parties in the case to intervene in the proceedings (R. 197-198). Defendants joined Judge Carter in opposing the writ (Appx. p. xvii). The Government intervened to support the merits of the petition, expressly taking "no position as to the availability of the extraordinary writ of mandamus to review the action of the district court" by the Court of Appeals (R. 204). By way of explanation as to why they had stipulated to the entry of the first protective order, Government counsel stated below that it "was to our advantage at that time" because it permitted "us to obtain immediate access to the material" (R. 222). And it urged in the lower court that even though the existence of the protective orders led to settlement by consent, "there is no justification for continuing such orders in effect" after the agreement of defendants was obtained (R. 178-179).

The Court of Appeals reversed the order of the District Court and directed Judge Carter to permit Olympic Refining Company access to the documents held under seal (R. 412-421). In so doing, the Court of Appeals held (1) that review of Judge Carter's order was not within the exclusive appellate jurisdiction of this Court by virtue of the Expediting Act, and (2) that Judge Carter had no discretionary *power* to deny Olympic Refining Company access to the documents held under protective order.

REASONS FOR GRANTING THE WRIT

A. In holding that the order of the District Court in denying the Government's motion to vacate the protective orders was not within the exclusive appellate jurisdiction of this Court by reason of the Expediting Act (15 U.S.C. 29), the court below decided an important question of Federal law in conflict with decisions of this Court and those of the Courts of Appeals in other circuits.

The Expediting Act provides in relevant part (c. 544, 32 Stat. 823; 15 U.S.C. 29):

> "In every civil action brought in any district court of the United States under * * * [the antitrust laws] wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

These provisions, this Court has consistently held, confer on it exclusive appellate jurisdiction over *all* orders, both interlocutory and final, entered by district courts in such cases on matters in dispute between the Government and parties defendant.[3] This is true even where the order is entered on the motion of a third person after a final decree if the question raised involves the public interest.[4]

The court below held that the Expediting Act was not applicable to this case because the dispute was "essentially a controversy between private parties in which the Government is not directly concerned" (Appx. p. xviii). Yet it was

3. See, for example, *Terminal R.R. Assn. v. U.S.* (1924) 266 U.S. 17; *Hughes v. United States* (1952) 342 U.S. 353; *Chrysler Corporation v. U.S.* (1942) 316 U.S. 556; *Swift & Co. v. United States* (1928) 276 U.S. 311; *U.S. Alkali Assn. v. U.S.* (1945) 325 U.S. 196, 201-202; *De Beers Mines v. United States* (1945) 325 U.S. 212, 217; and the Opinion of Mr. Justice Goldberg in *United States v. FMC Corporation* (1963) 84 S.Ct. 4.

4. *U.S. v. California Canneries* (1929) 279 U.S. 553; *Pipe Line Co. v. U.S.* (1941) 312 U.S. 502; *Allen Co. v. Cash Register Co.* (1944) 322 U.S. 137.

the Government that moved Judge Carter to vacate the protective orders, and it has urged at every stage of these proceedings that consideration of the orders involve fundamental precepts of public policy "which transcend the outcome of this particular case."[5] Under these circumstances, the decisions of this Court and of other courts of appeals make it clear that the order of the District Court is within the exclusive appellate jurisdiction of this Court under the provisions of the Expediting Act. In this regard, it should be noted that the Government took no position on the jurisdictional question presented to the Court of Appeals (supra, p. 6).

In *Terminal R.R. Assn. v. U.S.* (1924) 266 U.S. 17, a decree had been entered against a railroad terminal association and the railroads which made use of its facilities. A dispute arose among the railroad defendants as to whether the east or west side lines were obligated under the decree to pay certain terminal charges. The Government did not join in the complaint filed in the district court nor did it participate in the hearings which led up to the entry of an order. On appeal, however, it aligned itself on the merits with the west side lines. This Court held that under the Expediting Act a direct appeal was properly taken.

Again in *U.S. v. California Canneries* (1929) 279 U.S. 553, a consent decree was entered in 1920 against a number of meat packers. Under the provisions of the decree the defendants were enjoined from engaging in the grocery

5. R. 204. Its motion to vacate argued the Government presented "important questions of public policy including the accommodation of The Publicity in Taking Evidence Act * * * to the protective orders as well as the relationship of these orders to the consent decree entered into by the United States and the defendants in the government antitrust case." This was the position which the Government urged before the lower court (R. 148, 151-153) and before the Court of Appeals (R. 214, 218).

business. Two years later a co-operative cannery sought intervention on the ground that the decree interfered with a contract under which one of the defendants had agreed to purchase canned goods from the co-operative. The trial court denied intervention, but was reversed by the court of appeals. The trial court then entered an order suspending the operation of the decree until after disposition of the questions raised by the intervenor. The Government promptly moved the court of appeals to vacate its order granting intervention on the ground that the Supreme Court had exclusive appellate jurisdiction. On denial of its motion, the Government petitioned for certiorari. This Court held that the court of appeals improperly assumed jurisdiction, the case being governed by the Expediting Act, and directed that the decree should be made immediately effective.

Contrary to the decision below, the Third Circuit has followed *California Canneries* and declined to review a district court order in a Government antitrust case even though the matter in controversy concerned the rights of a third person (*Missouri-Kansas Pipe Line Co. v. United States* (3 Cir. 1939) 108 F.2d 614, certiorari denied (1940) 309 U.S. 687; see also *National Ass'n of Real Estate Boards v. United States* (D.C. Cir. 1949) 176 F.2d 631).

The court below sustained its jurisdiction by relying on *Shenandoah Broadcasting v. A.S.C.A.P.* (1963) 375 U.S. 39, 40.[6] But that case is inapposite. The court there excluded from direct review only those cases where the order of the

6. The following are the reported opinions in the case: *United States v. American Society of Composers, Auth. & Pub.* (S.D. N.Y. 1962) 208 F. Supp. 896, dismissed for want of jurisdiction (1963) 371 U.S. 540, dismissed for want of jurisdiction (2 Cir. 1963) 317 F.2d 90, reversed sub nom *Shenandoah v. A.S.C.A.P.* (1963) 375 U.S. 39, district court affirmed (2 Cir. 1964) 331 F.2d 117, certiorari denied (June 23, 1964) 32 U.S. Law Week 3445.

district court "is entirely between private parties and is outside the main stream of the litigation in which the Government is directly concerned" (p. 40). The case involved a consent decree which was entered in 1941 against ASCAP. The owners of some 364 television stations, including Shenandoah, had applied to ASCAP for a new type of license which ASCAP contended it was not obligated to supply under the terms of the consent decree. While the Government appeared before the Second Circuit on the question of that court's jurisdiction to review the order of the district court, it took no position at any time on the merits of the controversy. As the district court noted, "The government is in accord with petitioners on the principle that if the court finds the type of license requested to be reasonable, it has the power to compel its issuance; *it, however, expresses no opinion on the reasonableness of the license.*"[7] The case was purely a private controversy. The Government was not directly concerned.

In contrast, the issue involved here is essentially between the Government and defendants. It was raised by the voluntary action of the Government in moving for vacation of the protective orders despite its having agreed to one and proposed another. The Olympic subpoena placed the Government under no legal compulsion to make the motion. Had it chosen to defend the protective orders, which defendants urged it to do, the Government need only have moved to quash the subpoena (supra, p. 5). By accepting all the advantages it sought from the entry of the orders (supra, p. 6) and then seeking to deprive defendants of the protection for which they bargained, the Government has posed a question lying squarely in the "main stream" of this

7. *United States v. American Society of Composers, Auth. & Pub.* (S.D. N.Y. 1962) 208 F.Supp. 896, 897. Emphasis here and throughout is added unless otherwise stated.

litigation. Resolution of the question directly affects the rights of defendants as well as accepted procedures for pretrying and disposing of all civil antitrust suits brought by the Government (infra, pp. 20-21).

B. The court below held that the District Court did not have the power, regardless of the circumstances, to continue in effect protective orders entered in a Government antitrust case where the orders denied a treble-damage plaintiff access to documents prepared by the Government in response to the interrogatories of defendants. In so holding, the court below rendered a decision in conflict with the applicable decisions of this and other courts and has so far departed from the accepted and usual course of judicial proceedings in deciding an important question of Federal law as to call for an exercise of this Court's power of supervision.

In considering the motion by the Government to vacate the protective orders, Judge Carter proceeded on the assumption that he had the discretionary power to enter the orders and that he had the same power to vacate, modify or continue them in effect (supra, p. 5). In the exercise of his discretion he decided to deny the motion to vacate for two reasons: First, the documents which Olympic Refining Company wanted to see (the Government's answers to defendants' interrogatories) contained no facts, only the theories and contentions of Government counsel prepared for use in defining and limiting the issues on which the case would go to trial or be settled. No real prejudice would result to Olympic if it were deprived of access to such material (supra, p. 5; Appx. p. xii).[8]

8. Judge Carter pointed out that had Olympic sought access to *defendants'* answers to the Government's interrogatories, which admittedly contained factual statements and admissions, under a showing of need for either impeachment or similarly important purpose, he would have granted access (R. 346). He thus recognized the rule of *Ex Parte Upperco* (1915) 239 U.S. 435, in which this Court held that if a document under seal contains facts or admissions (there a deposition) "anyone needing it as *evidence* at a trial has a right to call for it" (239 U.S. 440).

Secondly, Judge Carter took cognizance of the sound policy considerations which justified the entry of the protective orders (supra, p. 5). They made possible complete and mutual disclosure by the parties of their respective legal and factual positions; even more important, they led to ultimate settlement of the case by consent decree. Were such orders to be lightly set aside on motion of the Government and in the absence of a compelling need by a treble-damage plaintiff, they would lose their value as one of the limited number of tools available to a trial court in expediting and encouraging settlement of protracted Government antitrust cases.

In reversing, the Court of Appeals did not question the circumstances which persuaded Judge Carter that he should exercise his discretion to continue the protective orders in effect. But it lays them aside as irrelevant, holding that Judge Carter's action was *not* a matter of discretion: he had no *power* to deny Olympic access to the documents it sought.[9] He lacked this power, says the court below, (1)

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9. Had the court below treated Judge Carter's order as an exercise of discretionary power, it would have limited the scope of its review to that which it and other courts prescribe in testing a discretionary act (*Porter v. Lux* (9 Cir. 1946) 157 F.2d 756, 757: "It is well settled that this court will not interfere with the action of a District Court in the exercise of its discretion unless there has been a plain abuse of that discretion. * * * The test is not what this court would have done under the same circumstances—that is not enough. The court must feel that only one order could have been entered on the facts"; *Delno v. Market St. Ry. Co.* (9 Cir. 1942) 124 F.2d 965, 967: "Discretion * * * is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that *discretion is abused only where no reasonable man would take the view adopted by the trial court.* If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion"; *Allen Co. v. Cash Register Co.* (1944) 322 U.S. 137, 142: "The exercise of discretion * * * is not reviewable by an appellate court unless clear abuse is shown"; *Locomotive Engineers v. M.-K.-T. R. Co.* (1960) 363 U.S. 528, 535 (reversing a Court of Appeals for setting aside the discretionary action of a district judge).

because it was not granted by "Rule 30(b) nor any other rule or statute" (Appx. p. xxi); and (2) because of an overriding policy, stemming from the Rules of Civil Procedure and the Publicity in Taking Evidence Act, which requires that the results of discovery in general, and particularly in Government antitrust suits, be made available to any third person who can show that such discovery has some relevance to the "subject matter" of his action (Appx. p. xxi).

The court below thus lays down a "per se" rule that a trial judge simply cannot enter an effective protective order covering discovery in a Government antitrust case.[10] Its error, we submit, is clear and the impact on future antitrust enforcement is far-reaching.

1. Contrary to the holding of the court below, a trial judge does have discretionary power, by specific provision of the Federal Rules of Civil Procedure and under his general equity powers, to enter and continue in effect protective orders which limit or prevent disclosure of discovery and other documents prepared or filed in the pretrial stages of a case even though the documents might have some relevance to the subject matter of another action for which they are sought.

While the Court of Appeals recognizes that a trial judge has discretionary power to *enter* a protective order covering discovery, it holds that "neither Rule 30(b), nor any other rule or statute * * * *authorizes* a district court to protect [it] from such disclosure as is 'relevant' to another

10. The Court of Appeals *says* that it is not passing on "the initial validity of the three protective orders" (Appx. p. xviii). Yet by its holding that the orders must be modified to permit any interested third person access to any of the documents sealed, the court necessarily holds that the protective orders were at all times ineffective. "Validity" is thus equated by the court below to the failure of any third person to request access to the sealed documents.

pending action (Appx. p. xxi); this is a "limitation on the power which may be exercised under Rule 30b" (Appx. p. xxii). "Relevance" is present, says the Court, whenever the material might *lead* to evidence even though it admittedly is *not* evidence (Appx. p. xxiii).

The discretionary power conferred on a trial judge by Rule 30(b) is not narrowly confined as the court below holds. It "confers great power upon the court" and was "introduced as a safeguard for the protection of parties * * * on account of the unlimited right of discovery given by Rule 26" (Notes of Advisory Committee and Commentaries following 28 U.S.C., Rule 30, pp. 363-364). The Rule, which had its genesis in the broad powers of an equity court, provides in relevant part:

> "* * * the court in which the action is pending may make an order * * * that the examination [by deposition] shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court."

These provisions are incorporated by reference into Rule 34 (motions to produce) and Rule 33 (interrogatories), thus giving a trial court equally broad power to enter orders preventing disclosure of interrogatory answers and produced documents.

Even apart from Rule 30(b), a trial court has inherent equitable powers to control all proceedings before it (*Du Pont Powder Co. v. Masland* (1917) 244 U.S. 100, 103). This includes the power to seal or otherwise limit the use of the results of discovery as well as other documents filed in the case. (*International Products Corporation v. Koons* (2 Cir. 1963) 325 F.2d 403, 407; *Sperry Rand Corporation v. Rothlein* (2 Cir. 1961) 288 F.2d 245, 249).

Courts, in the exercise of their *discretion*, have modified protective orders and have refused to grant protective orders. And there are cases in which a district court's action in refusing to modify a protective order has been held an *abuse of discretion*. But it is uniformly held, contrary to the decision below, that a trial court has the *power*, either under Rule 30(b) or through its general equitable powers, to enter such orders or to refuse to modify them even though the information is "relevant" to some other action. (See, for example, *Sperry Rand Corporation v. Rothlein*, supra, and *Baim & Blank, Inc. v. Bruno-New York, Inc.* (S.D.N.Y. 1955) 17 F.R.D. 346, 349).

The decision below stands alone in its drastic restriction of the power of a trial court to enter protective orders. It would vitiate a most effective and widely used procedure for accommodating the needs of all parties in resolving ever-present controversies over the boundaries of permissible discovery. The importance of the ruling "thus far transcends the situation confronting" petitioners (*Hickman v. Taylor* (1947) 329 U.S. 495, 507). There is, we submit, "need for a uniform rule on the point" (*Commissioner v. Bilder* (1962) 369 U.S. 499, 501).

2. Contrary to the holding of the court below, neither the Publicity in Taking Evidence Act nor Rule 43(a) curtails, in a Government civil antitrust case, the broad discretionary power of the trial court to enter and continue protective orders which prevent disclosure of the results of pretrial discovery.

(a) *The Publicity in Taking Evidence Act.* It is the rationale of the court below that the provisions of this Act, although only referring to depositions, require that all discovery in Government antitrust cases be open to the public; hence, it is beyond the *power* of a trial court to enter pro-

tective orders which in any way limit access by third persons to the results of discovery in such cases (Appx. pp. xix-xx).

The generalization of the court below as to the scope of the Act is supported neither by its wording nor by the circumstances which led up to its passage. It provides (15 U.S.C. 30):

> "In the taking of depositions of witnesses for use in any suit in equity brought by the United States under * * * [The Sherman Act], and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceeding shall be valid or enforceable."

The Act, passed in 1913, was prompted by an order entered in *United States v. United Shoe Machinery Co. of N. J.* (D. Mass. 1912) 198 Fed. 870, a Government civil antitrust case (Cong. Rec. Vol. 49, Part 2, p. 1434; Part 3, p. 2512; Part 5, p. 4627). The order directed that testimony be taken by a master behind closed doors. This was in keeping with the old equity practice under which depositions of witnesses could be taken before masters; the transcripts of the depositions became the testimony admitted at the trial. The court's order in the *Shoe Machinery* case thus had the effect of excluding the public from the *trial* of the case, and this was what Congress sought to prevent in passing the Act.

It was by design that Congress limited the statute to the "taking of depositions of *witnesses* for *use* in any *suit*" and to "*hearings* before any examiner or special master appointed to take *testimony*." It was by design that Congress entitled the statute "An Act Providing for publicity in *taking evidence*" (c. 114, 37 Stat. 731).

There is a second, and even more compelling, reason why the lower court erred in construing the Act to mean that a trial court cannot limit the persons who may attend discovery depositions nor limit disclosure of such depositions or of documents or interrogatory answers produced and prepared by the parties in Government antitrust cases. This construction brings the Act into irreconcilable conflict with Rule 30(b).[11] The statute authorizing the promulgation of the Federal Rules of Civil Procedure specifically provided that the Rules "shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect" (c. 651, 48 Stat. 1064, June 19, 1934). By virtue of this Act, every Rule "has the force of a Federal statute."[12] Thus, to the extent that the Publicity in Taking Evidence Act is repugnant to Rule 30(b), it stands repealed. (See *King v. Cornell* (1882) 106 U.S. 395, 396; *United States v. Tynen* (1870) 78 U.S. 88, 93; *Henrietta Mining & Milling Co. v. Gardner* (1899) 173 U.S. 123, 128-129; and *Adkins v. Arnold* (1914) 235 U.S. 417, 421.)

11. The pertinent provisions of Rule 30(b), quoted supra, p. 14, expressly grant to trial courts the power to limit the persons who may be present at discovery depositions and to limit the disclosure of the contents thereof. As we there point out, the court has the same power to limit disclosure of documents produced and interrogatory answers given by the parties under Rules 33 and 34.

12. *Sibbach v. Wilson & Co.* (1941) 312 U.S. 1, 13, modified on other grounds 312 U.S. 655. In elaboration of its holding, the court went on to say (p. 14-15):

> "* * * in accordance with the Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature.
>
> "The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose."

However, as noted above, the Act is not, either in its wording or in light of the circumstances which prompted its passage, in conflict with Rule 30(b), and the Court of Appeals erred in giving it a construction which would render it repugnant. (*Silver v. New York Stock Exchange* (1963) 373 U.S. 341, 357; *Rosenberg v. United States* (1953) 346 U.S. 273, 294; *United States v. Borden Co.* (1939) 308 U.S. 188, 198.) In any event, the Act does not abridge the discretionary power which Judge Carter had to enter the protective orders and continue them in effect.

In the only other case found which dealt with the precise issues here involved, the decision is directly in conflict with the opinion below. In *United States v. United Fruit Company* (Civil No. 4560, E.D.La.), an unreported Government civil antitrust case, the court entered a protective order under Rule 30(b) which prohibited disclosure before trial, or inspection at any time, of any answer to any interrogatory (R. 153-154). The case was ultimately settled by consent decree, and the Government thereafter moved to vacate the protective order. It argued, as it did before Judge Carter and later before the court below, that the Publicity in Taking Evidence Act requires that discovery in Government antitrust cases be open to the public and not held under protective order. The judge in the *United Fruit* case denied the Government's motion and refused to lift the protective order. The Government did not seek review of the judge's action.

b. *Rule 43(a).* The court below cites Rule 43(a) as evidence of a basic policy that "trial and pretrial proceedings are ordinarily to be conducted in public" (Appx. p. xix). That Rule, however, applies only to the *trial* of a

case and has nothing to do with pretrial matters.[13] Inasmuch as the present case was settled by consent decree before the taking of any evidence, Rule 43(a) has no bearing on the present controversy.

In *Birnbaum v. Wilcox-Gay Corp.* (N.D. Ill. 1953) 17 F.R.D. 133, the court held that all matters and proceedings before actual trial of the case were subject to the trial court's power to "impound, suppress and seal" (p. 135). It found such authority generally in Rule 77(b) (quoted in Appx. p. ii, and providing that while trials shall be held in open court, all other proceedings may be conducted in chambers) and more specifically in Rule 30(b) (17 F.R.D. 139):

> "The records of proceedings of a court are not required to be open to public inspection until after trial. * * * Rule 30(b) recognizes this principle in its provisions authorizing the suppression and sealing of information and documents in connection with the taking of depositions."

In this connection, it should be noted that secrecy rather than full disclosure is not uncommon at all stages of a Government antitrust proceeding up to actual trial. Whenever it will aid effective enforcement, secrecy is afforded and often insisted upon. Grand jury proceedings are kept secret. The names of informers are kept secret. Information supplied the Government under a Civil Investigative Demand must be held in confidence (15 U.S.C. 1313(c)). Secrecy is adopted wherever it aids rather than thwarts the public interest.

---

13. The Rule in pertinent part provides (28 U.S.C. Rule 43(a), Appx. p. ii):

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules."

This was true in the present case. It is an admitted fact, found by Judge Carter, that defendants waived objections to interrogatories, provided a fuller disclosure than the Rules required of them, negotiated for and agreed to accept a consent decree—all in reliance upon the entry and continuing effectiveness of the protective orders (Appx. pp. iii-iv, viii-ix, x-xi). And it is an admitted fact that the Government stipulated to the entry of one of the orders and moved the entry of another (Appx. pp. vii-viii). Expediting the disposition of a complex Government antitrust case by avoiding proper but almost endless argument over the appropriate scope of discovery is in the public interest.[14] The disposition of such cases by consent decree is in the public interest. Congress expressed this in providing that consent decrees may not be relied upon by treble-damage plaintiffs suing on the same alleged violations (15 U.S.C. 16(a)).[15]

14. Concern over the burden imposed by the Big Case on parties and on our court system has repeatedly been expressed by bench and bar; and both have directed their efforts toward developing procedures for expediting the disposition of such cases. See Procedure in Antitrust and Other Protracted Cases—Report adopted by the Judicial Conference of the United States (1951) 13 F.R.D. 62; Handbook of Recommended Procedures for the Trial of Protracted Cases—adopted by the Judicial Conference of the United States (1960) 25 F.R.D. 351; Report of the Committee on Practice and Procedure in the Trial of Antitrust Cases of the Section of Antitrust Law of the American Bar Association (1954); Streamlining the Big Case—Report of Special Committee of the Section of Antitrust Law of the American Bar Association (1958).

15. See *City of Burbank v. General Electric Company* (9 Cir. 1964) 329 F.2d 825, 835; *Sinco Sales Service of Pennsylvania v. Air Reduction Co.* (E.D. Pa. 1963) 213 F.Supp. 505, 507; and *Twin Ports Oil Co. v. Pure Oil Co.* (D. Minn. 1939) 26 F.Supp. 366, 371.

By holding that Judge Carter had no power to deny a treble-damage plaintiff access to documents which set out Government counsel's contentions as to what they would prove and how they would prove it, even though his action was admittedly in furtherance of the Congressional policy promoting consent decrees, the court below demands a result which Congress has specifically considered but declined to enact into law.[16] The effect of the decision below on consent settlements has already been predicted by one writer in the antitrust field:

> "* * * a policy decision may have to be made to reconcile discovery practices in this area with the congressional purpose, manifested in Section 5 of the Clayton Act, of encouraging consent settlements of government antitrust proceedings. Greater freedom of access by third parties to documents submitted to the government during consent-order negotiations will undoubtedly serve to inhibit the exchange of information during such negotiations. Sometimes the negotiations will become more protracted, and sometimes settlement without full litigation will be prevented" (BNA Antitrust and Trade Regs. Rep. #156 (1964), p. B-5).

16. Two bills have been introduced into Congress, one in 1958 and one in 1959 (R. 386-389), which provide that before a consent decree in a Government antitrust action can be entered, the Government must prepare and file a statement describing how it intended to prove its case—a precise description of the Government's answers to interrogatories in this case which Olympic wants to see. These bills were proposed for the specific purpose of assisting treble-damage plaintiffs in those instances where Government cases were settled by consent decree (The Role of Private Antitrust Enforcement in Protecting Small Business—1958, Report No. 1855 of the Select Committee on Small Business, U.S. Senate, 85th Cong., 2d Sess., pp. 10-12, 31).

CONCLUSION

The decision of the Court of Appeals is clearly erroneous. It is in conflict with the decisions of this and other courts. It is contrary to the provisions of pertinent statutes and the policy objectives of Congress which prompted their enactment. And the effect of the decision on future pretrial and disposition of Government antitrust cases is so prejudicial, we submit, that it should not be allowed to stand.

For the reasons herein stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
August 14, 1964.

Respectfully submitted,

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(Appendices Follow)

Appendix A

Expediting Act of 1903:

"That in every [civil action] pending or hereafter brought in any [district] court of the United States under [the Sherman Act] wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the [district] court will lie only to the Supreme Court." 32 Stat. 823

Publicity in Taking Evidence Act of 1913:

". . . in the taking of depositions of witnesses for use in any suit in equity brought by the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable." 37 Stat. 731

Enabling Act of 1934:

". . . the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect." 48 Stat. 1064.

Rule 30(b), Federal Rules of Civil Procedure:

"Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral exam-

ination; upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." 28 U.S.C. Rule 30(b).

Rule 43(a), Federal Rules of Civil Procedure:

"Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. . . ." U.S.C. Rule 43(a).

Rule 77(b), Federal Rules of Civil Procedure:

"All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby."

Appendix B

[R. 344-347]

In the United States District Court
Southern District of California
Southern Division

Honorable James M. Carter, Judge Presiding

No. 11584-C
United States of America, Plaintiff, vs. Standard Oil Company of Calif., a corp., et al., Defendants

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Friday, September 26, 1963

* * *

I am going to deny the Government's motions.

I want an order and I want some findings drawn. I want a finding, first, as to what this DDMOT is. Mr. Morton pretty accurately described it as to what that is.

And the same is true of the answers of the Government to the defendants' interrogatories—the source material for both of these, the two Grand Jury proceedings, the FBI Reports, documents obtained from the defendants, et cetra. I want a finding on that.

Secondly, I am prepared to find that looking at the whole case and the discovery that went on, the culmination in the consent decree, that there was a consideration by the defendants for the production of documents and supplying of material, which they did in a far more extensive manner

than they would have had it not been for the protective orders and the understandings that preceded the protective orders. In other words, on many of these documents undoubtedly there had been restrictions placed on attempts to keep them out on the grounds that they were trial information, that they would be of no value to the case but might help a competitor, and I want a finding that there did exist this quid pro quo, and that it was one of the factors that led to a consent decree.

I may not be able to keep all my findings and legal conclusions separate, but you can separate them out later.

Now, there are two policies involved: The general policy that court proceedings should be open, and there is the other policy that consent decrees should be furthered; and I am not so sure but that this Judge in the Commonwealth case in the Seventh Circuit didn't pretty well analyze that matter.

In other words, in the ordinary treble damage case, as far as the judgment or the findings are concerned, the only time you get any advantage in a treble damage case is when the case has been tried.

And there is the further rule that you can't have a consent decree if any evidence formally has been taken. We had that ruling facing us right in the face when we finally had the hearing on what type of relief the Court could give, and we had to do that in such a way as not to call witnesses or produce evidence but to have some kind of showing made that would not be disputed, on which the Court could act in the pre-trial. And I am inclined to think the public policy goes something like this: That if the case is tried and the defendants don't want to consent to a decree, then they take the penalty, they bear the burden of having the findings and judgment used against them in a treble damage proceeding if they are unsuccessful in the first suit.

On the other hand, if a consent decree is entered into, the purpose of the law is to encourage these consent decrees. Anti-trust cases are expensive. Many anti-trust cases are concluded by consent decrees, minor cases, very shortly after they are filed. It is not an unusual thing for a defendant to realize that it is out of line and say, we are not going to do this any more—we will consent.

Therefore, I think with the conflict of these two policies, and in view of the findings as to the consideration that passed back and forth on the discovery, I think the policy of protecting the defendants where an anti-trust decree has been entered should be sustained.

Next, Olympic has plaintiff's interrogatories and defendants' interrogatories. They can ask questions. They can get answers. I hate to suggest this, but in logic I have to. The only material thing I might see would be if you would ask the defendant a certain question and the defendant answered it and then you came to me and said, "Well, we want to see whether he answered it the same way when the Government asked him that question." Conceivably we might have to have an in camera hearing and see whether the question was answered in the same way. In that sense the material you seek might be material. However, I hope you would not feel it necessary to take that kind of step. I am inclined to think these defendants have in the past, and will in the future, make honest answers whether it hurts them or not.

Next, to grant this motion would cause no end of trouble and it would accomplish very little. The first [illegible]g that would happen, Mr. Blecher, is that the Government would come in and pull out this Attorney General's order prohibiting them from supplying you any information. If that failed and somebody was going to be held in contempt, they would fall back on the fact that much of this material came from

FBI investigations and Grand Jury proceedings. And when you got all done you wouldn't get very much. Likewise, you open the door to defendants' motion where defendants would say, "Wait a minute. We supplied this particular material with a particular understanding. We now have objections which we did not then raise, but which we now raise." Those would have to be passed upon.

Next, this matter that is being kept from your view is not evidence—and I want a finding on that; it is contentions, it is theories, it is arguments. It is not evidence. No documents are being sealed, no evidence you could use in court is being denied you.

Another finding. This DDMOT and these answers are really the Government's work product and you are not really asking for evidence; you are asking for the work product of the Government's lawyers.

I think I should interpret the order of December 1956, and strictly on its face it has the limitation of which Mr. Blecher speaks, but in the framework of the Standard Oil case and what went on in the case the purpose of the order—and I am willing to draw a minute order—was that not only this should be retained by the Clerk, but that the parties to this proceeding should not divulge the matters.

I think I should also quash that subpoena. Mr. Blecher was very fair in pointing out that that is really an issue. I think I should quash the subpoena and terminate any further proceedings on that score.

[R. 190-196]

In the United States District Court
Southern District of California
Southern Division

No. 11584-C

United States of America, Plaintiff, vs. Standard Oil Company of Calif., a corp., et al., Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 27, 1963, the Government's motion in *United States of America v. Standard Oil Company, et al.*, (herein referred to as "action 11584-C) to vacate certain orders of this Court, entered in said action on September 5, 1955, December 17, 1956 and June 19, 1959, came on for hearing, all parties hereinf, as well as Olympic Refining Company (plaintiff in a treble damage action entit'ed *Olympic Refining Company v. Standard Oil Company, et al.*, presently pending against two of the defendants he ein, referred to herein as "action 881"), having previously served and filed written memoranda in support of their respective positions. The Court having heard argument by counsel for all parties, as well as by counsel for Olympic Refining Company, and being fully advised in the premises, does make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The three orders in question one of which was entered pursuant to stipulation of all parties (order of September 6, 1955), one of which was entered on motion of

defendants over the Government's opposition (order of December 17, 1956), and one of which was entered at the Government's request with the consent of defendants General, Richfield, Shell, Standard, Tidewater and Union and without objection by defendant Texaco (order of June 19, 1959) (and the conditions under which defendant Texaco thereafter delivered its original answers to the Government's interrogatories to Government counsel)—cumulatively require that defendants' answers to the Government's interrogatories and the Government's answers to defendants' interrogatories shall be held in confidence by the respective parties in action 11584-C and not divulged except to the Court and counsel in said case, and that the answers of the Government to the defendants' interrogatories which are on file therein be held by the Clerk of this Court under seal.

2. The Government's motion to vacate the three orders was occasioned by the issuance of a subpoena at the request of Olympic Refining Company in action 881 which called for the Government (through Stanley E. Disney, Chief of the Los Angeles office of the Antitrust Division) to produce the Government's answers to defendants' interrogatories in action 11784-C. During the course of oral argument it was agreed by counsel for all parties, as well as by counsel for Olympic Refining Company, that the Court should not only rule on the Government's motions to vacate the protective orders but also on Olympic Refining Company's subpoena directed to the Government.

3. The Government, shortly after filing the complaint in action 11584-C in 1950, served on each defendant in said action extensive interrogatories inquiring into virtually every phase of the defendant's business over a period of some 14½ years. Defendants objected to many of the interrogatories on various grounds. Upon obtaining assurance

of the Government that their answers would not be filed and made public until so ordered by the Court, defendants resolved all of their differences with the Government concerning its interrogatories and over the next several years furnished the Government with the most intimate details of their respective businesses and eventually withdrew their objections to the Government's interrogatories. No information requested by the Government was withheld by defendants.

4. Some time after they had commenced responding to the Government's interrogatories, defendants in action 11584-C addressed interrogatories to the Government, including so-called "issue framing" interrogatories. While each defendant propounded its own interrogatories designed to fit its own case, they cumulatively called upon the Government to state its factual contentions with respect to each of the charging paragraphs of the complaint and to describe how it intended to prove those contentions.

5. In 1955, when the Government was ready to serve some of its answers, the prior informal understanding with respect to the confidential nature of interrogatory answers was amplified to include the Government's answers to the interrogatories of defendants. The agreement was formalized by stipulation and confirmed in the Court's order of September 6, 1955, which provides in substance that the interrogatory answers of all parties, and amendments or supplements thereto, shall be held in confidence, and that if any party desires to file its answers, appropriate notice must be given so that other parties to the proceeding may move for a protective order. The stipulation and order of September 6, 1955, intended that as to the confidential character of answers to interrogatories in the possession of the parties in action 11584-C the stipulation and order should continue after filing; and that only as to answers filed would a protective order be required.

6. To avoid duplication in answering the interrogatories of each defendant, the Government prepared its "Description of Documentary Material and Oral Testimony" (DDMOT), which was part of its answers to defendants' interrogatories and in the nature of a trial brief. The Government's answers, including the DDMOT, contained the Government's contentions, statements of what it hoped to prove, and, in some instances, an identification of its sources of proof. The Government's answers were based upon attorney interviews, FBI reports, two grand jury proceedings—one in 1939 and one in 1947-1949—and information supplied by the defendants voluntarily and in their answers to the Government's interrogatories. Essentially the answers are the work product of the Government's lawyers; none of the material contained in the answers is admissible evidence.

7. As action 11584-C proceeded, questions were raised concerning the sufficiency of the Government's answers to the interrogatories of the defendants. In order to secure a decision on the sufficiency of its answers, the Government, in November, 1956, gave notice of its intent to file them. The defendants moved under Rule 30(b) of the Federal Rules of Civil Procedure for a protective order sealing the Government's answers in the files of the Clerk of the Court. Defendants' motion was opposed by the Government. After considering the memoranda which were filed and hearing argument by counsel for all parties, the Court entered its order of December 17, 1956, which preserved the confidential character of the Government's answers and provided that the Clerk shall not divulge the answers to anyone except as directed by the Court.

8. Within the framework of these protective orders the Government obtained a full and complete disclosure of a great mass of material. Some of the material made available

to the Government was sensitive, competitive information; other data produced were in the nature of trade secrets. Without the protective orders and the assurances of the Government that the information would not be made public, defendants would have insisted upon their objections and the resulting rulings may have thereby eliminated the advantages to all concerned from the complete disclosure to the Government. The information requested by the Government was produced over a period of six or seven years. Once this information was made available and the defendants were apprised of the Government's contentions, the process of defining and limiting the critical issues could begin. Only evidence with respect to the defined issues would ultimately have come into the case at trial. It was at this juncture that the case was settled by consent decree as to six defendants, and later by stipulation was dismissed as to Texaco. It was possible to settle by consent and by dismissal as to Texaco all issues between the parties largely because of the complete information which had been made available by the defendants and by the Government's frank disclosure of its contentions thereon.

9. One of the principal factors leading to the settlement and final disposition of action 11584-C was that all the material produced by the defendants and by the Government was subject to the protective orders of the Court and would not be publicly disclosed. The existence of the orders formed an important part of the consideration which six defendants obtained in entering the consent decree in said action and Texaco, in stipulating to a dismissal without prejudice. Thus, at the time when the case was settled as to all defendants but Texaco, the third protective order dated June 19, 1959, was entered at the Government's request. This order reaffirmed the confidential character of interrogatory answers in the context of said action by providing that the

answers of defendants to the Government's interrogatories shall not be publicly disclosed except during the course of trial against Texaco. Texaco delivered the original copies of its answers to the Government's interrogatories with the same understanding. Since the Government's case against Texaco was voluntarily dismissed, the interrogatory answers have never been publicly disclosed.

10. No prejudice to the Olympic Refining Company will result from denying the Government's motion to vacate the protective orders. Through the normal discovery processes available to Olympic, it can obtain all information and documents relevant to its case from the files of the companies which are defendants in the Olympic case. As noted above, the Government's answers to the defendants' interrogatories contain no evidence admissible in this or any other case; they reveal only the contentions of counsel on the facts and law of this case.

CONCLUSIONS OF LAW

1. The protective orders are in accord with and further the congressional policy of encouraging the consent settlement of complex antitrust suits as well as the policy of encouraging full disclosure of all facts pertaining to such suits. The Government's motion to vacate the three protective orders therefore should be denied.

2. Compliance with the subpoena addressed to the Government by Olympic Refining Company would be contrary to the terms of the three protective orders issued by the Court. The subpoena therefore should be quashed.

IT IS SO ORDERED.

November 12, 1963.

/s/ JAMES M. CARTER
United States District Judge

[R. 412-421]

United States Court of Appeals

Ninth Circuit

May 19, 1964

Olympic Refining Company, a corporation, Petitioner, v. The Honorable James M. Carter, Judge of the United States District Court of the Southern District of California, Southern Division, Respondent.

No. 19011

Before HAMLEY, KOELSCH and DUNIWAY, Circuit Judges.

HAMLEY, Circuit Judge:

This proceeding was brought to vacate three protective orders entered in a Government antitrust suit, so that access could be gained to certain documents now withheld from public scrutiny. The district court entered an order denying the motion to vacate the protective orders, and this review was then instituted.

On February 28, 1958, Olympic Refining Company (Olympic) brought a treble-damage antitrust suit, referred to herein as the "Olympic case," against Standard Oil Company of California (Standard), and General Petroleum Corporation (General), in the United States District Court for the Northern District of California.[1] On May 29, 1963, Olympic gave notice in that case that on a specified date in Los Angeles, it would take the pretrial deposition of Stanley E. Disney, an official of the Antitrust Division of the United States Department of Justice.

1. District court jurisdiction was asserted under section 4 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

On June 3, 1963, the clerk of the United States District Court for the Southern District of California, acting upon request of Olympic made pursuant to Rule 45(d) Federal Rules of Civil Procedure, issued a subpoena duces tecum to Disney, requiring him to produce certain described documents at the deposition hearing referred to above. The described materials are copies of documents which the Government filed several years before in a Government antitrust suit entitled United States v. Standard Oil Co. of California, et al. then pending in the United States District Court for the Southern District of California, and referred to herein as the "Government case."[2]

The documents which Disney was required to produce were described as follows:

> (1) Plaintiff's (Government's) answers, amended answers, and supplemental answers to defendants' interrogatories and all documents and papers related thereto.
>
> (2) Documents designated "Description of Documentary Materials and Oral Testimony, Lists of Witnesses and Statements of Witnesses" and all amendments and supplements thereto.
>
> (3) Outline of Plaintiff's Contentions filed January 10, 1957.

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2. Standard, General and five other oil companies were defendants in the Government case. The other oil company defendants in that case were Shell Oil Co., Inc., The Texas Company (Texaco), Richfield Oil Corporation, Tidewater Associated Oil Company and Union Oil Company of California. All of these companies except Texaco worked out a consent decree with the Government which was approved as a final judgment on June 19, 1959. The case against Texaco was, by stipulation, voluntarily dismissed by the Government on March 7, 1961.

The combination and conspiracy alleged by Olympic in the Olympic case is virtually identical with the combination and conspiracy alleged by the Government in the Government case. While only Standard and General were named defendants in the Olympic case, all of the other oil companies which were defendants in the Government case were named as co-conspirators.

Since all these documents had been filed in the district court in the Government case, Olympic could have examined the filed originals and would not have had to seek copies from a Government official, were it not for the existence of certain protective orders which made it necessary for the clerk of the court to keep the filed originals under seal.

The first of these orders was entered on September 6, 1955, pursuant to a stipulation between the Government and the defendants in the Government case. It provided, in effect, that neither the plaintiff nor the defendants would file any of their respective answers to interrogatories without giving fifteen days' prior notice and that, until filed, such answers would be held in confidence.

The second such order, dated December 17, 1956, was entered in response to the defendants' motion, under Rule 30(b), Federal Rules of Civil Procedure, made after the Government gave notice, pursuant to the order of September 6, 1955, that it intended to file its answers to defendants' interrogatories. This order requires that the filed answers of the Government, "and all other documents and papers related thereto including the document designated 'Description of Documentary Material and Oral Testimony,' lists of witnesses, and statements of witnesses * * *" be retained by the clerk as though under seal.

The third protective order, dated June 19, 1959, was one of the two decretal provisions of an order granting the Government's motion that the defendants make prompt delivery to the Government of the original copies of their answers to the interrogatories of the Government. This provision of the order reads:

> "It Is Further Ordered that plaintiff shall not publicly disclose said answers to interrogatories except during the course of trial of this case or upon further order of this Court."

Faced with the subpoena duces tecum directed to Disney, the Government, on August 15, 1963, filed a motion in the Government case to vacate the three protective orders referred to above. Olympic intervened, without objection, in support of the Government motion. The motion was opposed by all of the defendants in the Government case. While there was no formal motion to quash the subpoena duces tecum, the propriety of that subpoena was necessarily drawn into question by the motion to vacate the protective orders. Accordingly, during the district court argument on the Government motion to vacate, all parties proceeded on the assumption that the court could make any order with reference to the subpoena which would be appropriate in view of the disposition of the motion to vacate.[3]

Following the argument, the district court on November 12, 1963, entered an order, supported by findings of fact and conclusions of law, denying the motion to vacate the protective orders and quashing the subpoena duces tecum directed to Disney. On November 21, 1963, Olympic moved in this court for leave to file a petition for a writ of mandamus directed to the district judge who had entered the order of November 12, 1963. The specific relief sought was an order directing the district judge to vacate the three protective orders or, in the alternative to vacate the order of November 12, 1963, insofar as that order quashes the subpoena duces tecum.

3. During the course of the argument in the district court, counsel for the Government orally urged that if the protective orders were vacated the subpoena should be quashed, since Olympic could then examine the original papers in the clerk's office. We observe, however, that if the protective orders were vacated, they would constitute no obstacle to Olympic's obtaining from the Government other documents covered by those orders, including the defendants' answers to the Government's interrogatories, which have not been filed in the Government case, but are in the Government's possession.

We granted the motion for leave to file the petition, called for a return thereto, and granted all parties in the Olympic case and the Government case leave to intervene in the mandamus proceeding. All did intervene, the Government in favor of Olympic and all others in opposition.

[1, 2] The respondent judge and the intervening oil companies joined in their presentation to this court and will be collectively referred to as respondents. At the outset they question the jurisdiction of this court to entertain this review proceeding. It is their contention that since the protective orders, and the order of November 12, 1963, were entered in a Government antitrust suit, they are reviewable, if at all, only by the Supreme Court of the United States. Section 2 of the Expediting Act of 1903, 32 Stat. 823, as amended, 62 Stat. 989 (1948), 15 U.S.C. § 29 (1958), quoted in the margin, is cited as authority for this view.[4]

It has been held that, under this statute, proceedings to review a district court order entered in such a suit, whether final or interlocutory, must ordinarily be had in the Supreme Court.[5] An exception, however, is made where the order sought to be reviewed is of an ancillary character disposing of a controversy between private parties outside the main stream of the litigation in which the Government is directly concerned. See Shenandoah Valley Broadcasting, Inc. v. American Society of Composers, Authors & Pub-

4. Section 2 of the Expediting Act reads:

"In every civil action brought in any district court of the United States under any of said Acts [antitrust acts], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

5. See United States Alkali Export Ass'n, Inc. v. United States, 325 U.S. 196, 201-202, 65 S.Ct. 1120, 89 L.Ed. 1554; DeBeers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 65 S.Ct. 1130, 89 L.Ed. 1566; United States v. F. M. C. Corp., 9 Cir., 321 F.2d 534, approved by Mr. Justice Goldberg, 84 S.Ct. 4, 11 L.Ed.2d 20.

lishers, 375 U.S. 39, 84 S.Ct. 8, 11 L.Ed. 2d 8, modified 375 U.S. 994, 84 S.Ct. 627, 11 L.Ed.2d 467.

In our opinion, the order of November 12, 1963, is of an ancillary character as so defined, and is therefore subject to review in this court. That order, dealing with the question of whether protective orders entered years ag[illegible] in a Government antitrust suit which was terminated in 1961, disposes of a controversy outside of the main stream of the litigation in the Government case. It is essentially a controversy between private parties in which the Government is not directly concerned, for although the Government made the motion to vacate the protective orders, it did so in aid of Olympic's effort to obtain access to documents which the oil companies do not wish to have released.

[3] We need not decide whether the order sought to be reviewed is final and therefore appealable (see Shenandoah, supra), in which event the motion for leave to file a petition for a writ of mandamus could be regarded as a timely notice of appeal. For if not appealable as a final order, mandamus is a proper remedy (see Ex parte Uppercu, 239 U.S. 435, 36 S.Ct. 140, 60 L.Ed. 368), and in the exercise of our discretion we would entertain the petition. See American Concrete Agricultural Pipe Ass'n v. No-Joint Concrete Pipe Co., 9 Cir., 706 F.2d 331.

The motion to dismiss the review proceeding for want of jurisdiction in this court is denied.

[4, 5] In seeking reversal of the district court order of November 12, 1963, Olympic and the Government question the initial validity of the three protective orders which the district court declined to vacate. However, we do not regard the question of whether the protective orders were valid when entered as properly before us. No party to the antitrust suit appealed from those orders and they are long since final. The only question which we may consider is whether, under the circumstances of this case, the district

court should have modified those orders so that Olympic could have access to the documents protected by the orders.

The district court found that, in the Government case, defendants waived objections to interrogatories, provided a fuller disclosure than might otherwise have been required of them, made possible the formulation of a consent decree, and agreed to such a decree (stipulated dismissal in the case of Texaco), all in reliance upon the entry and continuing effectiveness of the protective orders.

[6, 7] None of these circumstances, in our opinion, support the view that these orders are not subject to modification to meet the reasonable needs of other parties in other litigation. In the federal judicial system trial and pretrial proceedings are ordinarily to be conducted in public. Rule 43(a), Federal Rules of Civil Procedure, provides that in all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided in these rules. The purpose of the federal discovery rules, as pointed out in Hickman v. Taylor, 329 U.S. 495, 501, 67 S.Ct. 385, 91 L.Ed. 451, is to force a full disclosure.

This basic policy has been specifically applied in the field of Government antitrust litigation. In the Publicity in Taking Evidence Act, 37 Stat. 731 (1913), 15 U.S.C. § 30 (1958), it is provided that in the taking of depositions for use in any such suit "* * * the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable."[6] While this statute does

6. This statute was enacted in 1913 to nullify a district court ruling in United States v. United Shoe Machinery Co. of New Jersey, D.Mass., 198 F. 870, in which the public and press were denied access to a hearing before a special master at which depositions were taken. See 49 Cong.Rec. 2511-2514; H.R.Rep. No. 1356, 62d Cong., 3d Sess. (1913). See also United States v. Procter & Gamble Co., 356 U.S. 677, 683, 689, 78 S.Ct. 983, 2 L.Ed.2d 1077.

not expressly apply to the acquisition of information by means of interrogatories or subpoenas duces tecum, the policy behind the enactment is equally applicable to these forms of discovery.

[8] Private treble-damage actions are an important component of the public interest in "vigilant enforcement of the antitrust laws." Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 329, 75 S.Ct. 865, 99 L.Ed. 1122.[7] Congress had this in mind when it provided, in section 5(a) of the Clayton Act, 38 Stat. 731 (1914), as amended, 69 Stat. 283 (1955), 15 U.S.C. § 16(a) (1958), that the decrees entered in Government antitrust suits are, under certain circumstances, prima facie evidence in a subsequently-prosecuted private antitrust suit.

Congress was also interested in encouraging capitulation in Government antitrust suits, and so consent decrees entered before testimony was taken were exempted from the prima facie effect of section 5(a).[8] In addition to obtaining this exemption from section 5(a), a consenting defendant in a Government antitrust suit gains whatever benefit there may be in accepting the terms of the consent decree rather than risking a more onerous decree entered after litigation. A consenting defendant also benefits from the saving in litigation expense which is made possible by a consent decree. But neither in the express nor implied terms of the statutes or rules is there any indication that a consenting defendant could gain the additional benefit of holding under seal, or stricture of nondisclosure, for an indefinite time, information which would otherwise be available to the public or at least to other litigants who had need of it.

7. See also, Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-752, 67 S.Ct. 1015, 91 L.Ed. 1219.

8. See 51 Cong.Rec. 15824-25 (1914).

The district court found that "(s)ome of the material made available to the Government was sensitive, competitive information; other data produced were in the nature of trade secrets."[9] Presumably, this was the principal ground which led to entry of the protective orders, in view of the discretionary power vested in the district court under Rule 30(b) Federal Rules of Civil Procedure.[10] The information thus protected was then current, the parties were permitted to make necessary use of it, and no other person had manifested a need for the information.

But neither Rule 30(b), nor any other rule or statute called to our attention, authorizes a district court to protect trade secrets and sensitive competitive information from such disclosure as is relevant to the subject matter involved

9. We assume that the material to which reference was thus made was incorporated in the documents which the Government filed in the Government case as well as in the documents, including defendants' answers to interrogatories, which are in the possession of the Government, but which have not been filed.

10. Rule 30(b) reads:

"Order for the Protection of Parties and Deponents.

"After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression."

in a pending action.[11] All that may be done is to afford such protection from disclosure as is practicable, consistent with the right of access thereto for purposes of litigation. This limitation on the power which may be exercised under Rule 30(b) was respected in the Government case here in question for, as noted above, the protective orders did not prevent the parties thereto, who were the only persons then interested, from making such use of the documents covered by the orders as might be necessary in that litigation.

Now, nearly three years after termination of the Government suit, and from four to eight years after the documents were placed under the protective orders, Olympic, a litigant in another antitrust action based on the same alleged violations, seeks access to those documents for purposes of discovery. It is entitled to have the orders reconsidered as of this time, and modified in such form as to permit access to the documents subject to reasonable restrictions as to disclosure, whether or not some of the information contained in them may still be regarded as trade secrets or sensitive competitive information.

It is immaterial that Olympic could possibly obtain the same information through the process of propounding its own interrogatories to Standard and General. It is entitled to know what those companies and the alleged co-conspirators told the Government, and this requires examination of the documents which were exchanged, or exchanged and filed in that action.

It is likewise immaterial that some of the documents or information contained therein may not have been admissible as evidence in the Government case. Ex parte Uppercu, 239 U. S. 435, 440, 36 S.Ct. 140.

11 See Ex parte Uppercu, 239 U.S. 435, 36 S.Ct. 140; Hartley Pen Co. v. United States District Court, 9 Cir., 287 F.2d 324, 328; A. H. Robins Co. v. Fadely, 5 Cir., 299 F.2d 557, 561; Rule 26(b), Federal Rules of Civil Procedure.

Nor does it make any difference that the documents or information contained therein may not be admissible in the Olympic case. We are concerned with discovery proceedings. As stated in the last sentence of Rule 26(b), Federal Rules of Civil Procedure, it is not ground for objection to questions asked at a deposition hearing that the testimony will be inadmissible at the trial "if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 34, pertaining to the discovery and production of documents, has reference to papers or other tangible objects containing evidence "* * * relating to any of the matters within the scope of the examination permitted by Rule 26(b) * * *." See Hickman v. Taylor, 3 Cir., 153 F.2d 212, 218-219, aff'd on other grounds, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451.

The order of November 12, 1963, is reversed and the cause is remanded to the district court for entry of an order modifying the protective orders in such manner that Olympic may have access to the documents in question for use in the Olympic case, subject to such reasonable restriction as may be necessary and practicable to prevent unnecessary disclosure of any present trade secrets or presently sensitive competitive information that may be contained in such documents.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 395

THE HONORABLE JAMES M. CARTER, Judge of the United States District Court of the Southern District of California, Southern Division, et al.,
Petitioner,

vs.

OLYMPIC REFINING COMPANY, a corporation, and the UNITED STATES OF AMERICA,
Respondents.

BRIEF OF RESPONDENT OLYMPIC REFINING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE.

Respondent, Olympic Refining Co. (hereinafter Olympic) is a corporation which had been engaged in

the business of refining and marketing petroleum products in the States of California, Oregon and Washington. On February 28, 1958, Olympic filed a complaint in the United States District Court for the Northern District of California, Southern Division (San Francisco), against Standard Oil Company of California (hereinafter Standard), and General Petroleum Corporation (hereinafter General), charging those defendants with violations of the antitrust laws. Jurisdiction in that case was based upon Section 4 of the Clayton Act (15 U.S.C. 15).

Olympic's complaint asserted that the named defendants, acting jointly with specifically named co-conspirators[1] had engaged in a combination and conspiracy to restrain trade in and monopolize the production, refining, transportation and marketing of crude oil and refined petroleum products in five Western states.

On May 12, 1950, the United States filed a civil complaint in the United States District Court for the Southern District of California, Central Division (Los Angeles), against Standard, General, Shell Oil Co., Inc., Union Oil Company of California, Tidewater Associated Oil Company, The Texas Company, Richfield Oil Corporation and the Conservation Committee of California Oil Producers, charging those defendants with having engaged in a combination and conspiracy to restrain trade in and monopolize the

[1]The named co-conspirators are: Shell Oil Co., Inc., The Texas Company, Richfield Oil Corporation, Tidewater Associated Oil Company, Union Oil Company of California and the Conservation Committee of California Oil Producers.

production, refining, transportation and marketing of petroleum products in the States of California, Washington, Oregon, Nevada and Arizona. On August 24, 1956, the Government filed an amended complaint in that action.

The combination and conspiracy alleged by Olympic in its case against Standard and General, is almost verbatim the same combination and conspiracy alleged by the Government in the amended complaint in its equity suit (hereinafter referred to as the Government case).[2] Olympic alleged that it was injured by acts done pursuant to and in furtherance of the alleged illegal conduct charged in the Government case.[3]

During the discovery stages of the Government case, the defendants severally propounded voluminous interrogatories to the Government seeking to elicit the facts upon which the Government would rely to establish its claim for relief. The Government prepared answers and amended and supplemental answers to these interrogatories, which included a document designated as "Description of Documentary Material and Oral Testimony", a list of witnesses the Government proposed to call at trial and summaries

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[2]The Court below noted in Fn. 2 at 332 F. 2d at p. 262 that "The combination and conspiracy alleged by Olympic in the Olympic case is virtually identical with the combination and conspiracy alleged by the Government in the Government case. While only Standard and General were named defendants in the Olympic case, all of the other oil companies which were defendants in the Government case were named as co-conspirators."

[3]The Court of Appeals concluded that Olympic's antitrust action was "based on the same alleged violations" as the Government case. 332 F. 2d at p. 265.

of the anticipated testimony of these witnesses. These documents will be referred to hereinafter as the Government Answers. All of these documents were filed by the Government in the District Court and could have been examined by Olympic were it not for the existence of certain protective orders which required the Clerk of the District Court to keep those documents under seal.

The first of these orders was entered on September 6, 1955, pursuant to a stipulation between the Government and the defendants in the Government case. It provided, in effect, that neither the plaintiff nor the defendants would file any of their respective answers to interrogatories without giving fifteen days' prior notice and that, until filed, such answers would be held in confidence.

The second order, dated December 17, 1956, was entered over the objection of the Government in response to the defendants' motion, under Rule 30(b), Federal Rules of Civil Procedure, made after the Government gave notice pursuant to the order of September 6, 1955 that it intended to file its answers to defendants' interrogatories. This order requires that the filed Government Answers, "and all other documents and papers related thereto, including the document designated 'Description of Documentary Material and Oral Testimony', lists of witnesses, and statements of witnesses . . ." be retained by the Clerk as though under seal.

The third protective order, dated June 19, 1959, was one of the two provisions of an order granting the

Government's motion that the defendants in the Government case make prompt delivery to the Government of the original copies of their answers to the interrogatories. This provision of the order reads:

> "It is Further Ordered that plaintiff shall not publicly disclose said answers to interrogatories except during the course of trial of this case or upon further order of this Court."

On November 20, 1959, Olympic filed a motion for the production of documents pursuant to the provisions of Rule 34 of the Federal Rules of Civil Procedure in its case pending in the District Court in San Francisco. This motion sought, *inter alia,* the Government's answers and defendants' answers to Government interrogatories in the Government case.

On March 9, 1960, the Honorable Albert C. Wollenberg, Judge of the District Court for the Northern District of California, Southern Division, without written opinion and without prejudice, denied Olympic's motion insofar as it sought production of either the Government's Answers or defendants' answers to government interrogatories (Petition for Writ of Mandamus, pp. 6-7).

On May 16, 1962, at a pre-trial conference before the Honorable Lloyd Burke, Judge of the District Court for the Northern District of California, Southern Division, respondent renewed its motion for production of the Government's Answers and defendants' answers to Government interrogatories. Judge Burke, without entering a formal order, commented "I will read the material that is in the file but right now my

initial reaction, if you want the material, go down and get it from Judge Carter". (Petition for Writ of Mandamus, p. 7).

On May 29, 1963, respondent filed notice in its case in the District Court in San Francisco that, on a specified date, it would take the pre-trial deposition of Stanley E. Disney, Chief of the Los Angeles Office of the Antitrust Division. On June 3, 1963, the Clerk of the District Court for the Southern District of California, acting upon the request of respondent Olympic, made pursuant to Rule 45(d) of the Federal Rules of Civil Procedure, issued a subpoena duces tecum to Mr. Disney requiring him to produce certain described documents at the deposition hearing. The documents sought by this deposition were copies of the Government Answers filed in the Government case.

In lieu of responding to the subpoena duces tecum directed to Mr. Disney, the Government, on August 15, 1963, filed a motion in the Government case to vacate the three protective orders. Olympic intervened, without objection, in support of the Government motion. The motion was opposed by all of the defendants in the Government case.

On November 12, 1963, the District Court entered an order based upon findings of fact and conclusions of law, denying the motion to vacate the protective orders and quashing the subpoena duces tecum directed to Mr. Disney.

On November 21, 1963, respondent filed its application for leave to file a petition for a writ of mandamus directed to Judge Carter. The petition sought

an order directing Judge Carter to vacate the three protective orders or, in the alternative, to vacate the order of November 12, 1963 insofar as that order quashed the subpoena duces tecum. The Court of Appeals for the Ninth Circuit granted the motion for leave to file the petition and granted all parties in both the Olympic and Government Cases leave to intervene in the mandamus proceeding. The Government intervened in support of Olympic's petition for a writ of mandamus; all defendants in the Government case intervened in opposition thereto.

On May 19, 1964, the Court of Appeals issued its order reversing the order of November 12, 1964 and remanding the case to the District Court "for entry of an order modifying the protective orders in such manner that Olympic may have access to the documents in question for use in the Olympic case, subject to such reasonable restriction as may be necessary and practicable to prevent unnecessary disclosure of any present trade secrets or presently sensitive competitive information that may be contained in such documents". 332 F.2d at p. 266.

The present petition for writ of certiorari seeks to have this Court set aside that order of the Court of Appeals.

REASONS FOR REFUSING THE WRIT

SUMMARY OF ARGUMENT

Petitioners' contention that the Court of Appeals had no jurisdiction to review Judge Carter's Order of November 12, 1963 because the Expediting Act (15

U.S.C. 29) vested exclusive jurisdiction in this Court, is wrong for two reasons. First, it ignores the fact that Judge Carter's order quashed a subpoena duces tecum issued in the purely private litigation between Olympic, Standard and General. Such an order which vitally affects litigation over which the Court of Appeals unquestionably has appellate jurisdiction may be reviewed by mandamus in aid of that appellate jurisdiction under 28 U.S.C. 1651(a).[4] *United States v. Mayer*, 235 U.S. 555 (1914); *Roche v. Evaporated Milk Assn.*, 319 U.S. 21 (1943). See also *American Concrete Agricultural Pipe Assn. v. No-Joint Concrete Pipe Co. and the Honorable Harry C. Westover*, 331 F.2d 706 (9th Cir., 1964).[5]

In asserting that this Court had exclusive jurisdiction to review the order of November 12, 1963, petitioners treat the order as a "final judgment" in a "civil action . . . wherein the United States is complainant".[6] Plainly this is not such a case. For the

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[4]1651(a) provides that: "The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[5]In this case decided on April 27, 1964 (rehearing denied June 1, 1964) the Ninth Circuit said: "Under 28 U.S.C. 1651(a), this court may issue a writ of mandamus necessary or appropriate in aid of our appellate jurisdiction and agreeable to the principles and usages of law." 331 F. 2d at p. 709. In denying the issuance of a writ in that case, the Court however clearly stated that it had the "power to review by mandamus" an order of the District Court which was neither final nor appealable. 332 F. 2d at p. 709.

[6]The Expediting Act (15 U.S.C. 29) provides:

"In every civil action brought in any district court of the United States under any of said (Antitrust) Acts, wherein the United States is complainant, on appeal from the final judgment of the district court will lie only to the Supreme Court."

controversy below plainly was, and is, "entirely between private parties and is outside the main stream of the litigation in which the Government is directly concerned". *Shenandoah Valley Broadcasting v. A.S.C.A.P.*, 84 S.Ct. 8, 9 (1963).

Petitioners' second question is compound. In seeking review of whether or not the District Court had discretionary power to "enter and continue in effect" the protective orders, petitioners ignore the distinction between (a) the validity of the sealing orders when made and (b) the power of the District Court to enforce them against a litigant in a related case. But, the Court of Appeals noted ". . . we do not regard the question of whether the protective orders were valid when entered as properly before us". 332 F.2d at p. 264. Nor did the Court of Appeals have occasion to determine that the protective orders were not still valid as against the public at large. All that the Court of Appeals decided was that the District Court should have modified those orders so that Olympic, "a litigant in another antitrust action based on the same alleged violations", may have access to the documents for use in its litigation. And even that order was subject to the District Court's imposition on Olympic of "such reasonable restriction(s) as may be necessary and practicable to prevent unnecessary disclosure of any present trade secrets or presently sensitive competitive information that may be contained in such documents". 332 F.2d at p. 266.

In deciding that Judge Carter had no power to *enforce the protective orders* against Olympic, the

Court of Appeals applied the principle laid down by this Court in *Ex Parte Uppercu*, 239 U.S. 435 (1915).

Thus, there are no grounds warranting further review of any matter in this case by this Court. The petition for writ of certiorari should be denied.

ARGUMENT

Petitioners' first question asks:

> "Did the Court of Appeals have jurisdiction to review the order of the District Court in view of the provisions of the Expediting Act (c. 544, 32 Stat. 823; 15 U.S.C. 29) conferring exclusive jurisdiction on this Court in civil antitrust cases brought by the United States?"

We think it clear that the Court of Appeals had jurisdiction. Petitioners' argument is a classical bootstrap. By characterizing the present controversy as a final chapter in *United States v. Standard Oil Co. of California* (S.D. Cal. Civil 11584-C) (the Government case), and concluding that the issue involved in the Court below was "essentially between the Government and the defendants" in the Government case, petitioners ignore the reality of what transpired below.

Olympic, which had already twice attempted unsuccessfully to secure the sealed documents by discovery in its case pending in the District Court in San Francisco, and which had been judicially admonished to get the documents from Judge Carter, issued a subpoena duces tecum to Mr. Disney calling for the

Government Answers. The Court of Appeals recognized that the motions made by the Government to vacate the protective orders were no more than a reaction to that subpoena. The Court said: "Faced with the subpoena duces tecum directed to Disney, the Government, on August 15, 1963, filed a motion in the Government case to vacate the three protective orders . . . ." 332 F.2d at page 262. And Judge Carter also recognized that his ruling on the motion to vacate the protective orders necessarily affected and constituted a dispositive ruling on the subpoena issued in the Olympic litigation. He said:

> "I think I should also quash that subpoena. Mr. Blecher was very fair in pointing out that that is really an issue. I think I should quash the subpoena and *terminate any further proceedings on that score.*" (Appendix B, page vi, Petitioners' Brief.) (Emphasis added)

And the Order as to which the writ of mandamus was taken provided that:

> "Compliance with the subpoena addressed to the Government by Olympic Refining Company would be contrary to the terms of the three protective orders issued by the Court. The subpoena therefore should be quashed." (Appendix B, page xii, Petitioners' Brief.)

At all times it was apparent that the status of the subpoena duces tecum directed to Mr. Disney was, in fact, the ultimate matter for determination, and that the efficacy of the subpoena depended upon the enforceability of the protective orders. Thus, the Court of Appeals said:

> "While there was no formal motion to quash the subpoena duces tecum, the propriety of that subpoena was necessarily drawn into question by the motion to vacate the protective orders. Accordingly, during the district court argument on the Government motion to vacate, all parties proceeded on the assumption that the court could make any order with reference to the subpoena which would be appropriate *in view of the disposition of the motion to vacate.*" 332 F.2d at page 262. (Emphasis added)

Viewing the sequence of events here in context, two things are evident: (1) the subpoena duces tecum issued *in the Olympic litigation* precipitated the entire proceeding before Judge Carter and (2) while Judge Carter's Order of November 12, 1963 had no significance whatsoever in the Government case long since concluded, it did finally and dispositively preclude Olympic, in its litigation, from access to the sealed documents.

Notwithstanding the procedural manipulation through which the issue was presented, the Court of Appeals recognized that Judge Carter's ruling was final on the question of whether Olympic could get the documents. Accordingly, the Court of Appeals exercised its discretionary power to issue mandamus in aid of its ultimate appellate jurisdiction in the *Olympic* case. See *American Concrete Agricultural Pipe Assn. v. No-Joint Concrete Pipe Co. and the Honorable Harry C. Westover,* 331 F.2d 706 (9th Cir. 1964).

The jurisdiction of the Court of Appeals to issue mandamus in aid of its appellate jurisdiction is not

affected by the Expediting Act. This Court has recently held that the Expediting Act is not applicable where the "controversy which is disposed of by the District Court's order is entirely between private parties and is outside the main stream of the litigation in which the Government is directly concerned". *Shenandoah Valley Broadcasting v. A.S.C.A.P.*, 84 S.Ct. 8, 9 (1963).

In that case, the District Court for the Southern District of New York in 1950, entered an amended consent decree in a government Sherman Act suit requiring ASCAP, *inter alia*, to "grant to any user making application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory" subject to a reasonable license fee. On request of petitioners for a license, ASCAP refused to fix a fee and, as provided by the amended consent decree, an application was filed for an order to fix a reasonable fee. The District Court found that the consent decree did not require ASCAP to issue the type of license petitioners requested and, therefore, dismissed the application. The petitioners took an appeal to the Court of Appeals and also perfected a direct appeal to this Court under the Expediting Act (15 U.S.C. 29). This Court dismissed the appeal for want of jurisdiction. 371 U.S. 540 (1963). Thereafter, the Court of Appeals dismissed the appeal taken there on the ground that all appeals must be routed to this Court by reason of the Expediting Act.

This Court, in holding that the Court of Appeals had jurisdiction of the appeal, pointed out that "di-

rect appeals to this Court are authorized by that Act only from final judgments where the United States is a complainant. The purpose of the Act is to expedite litigation of 'great and general importance' where the Government is the aggrieved party." 84 S.Ct. at page 9.

Petitioners' assertion that *Shenandoah* is not applicable is based entirely on the unsupported assertion that the "issue involved here is essentially between the Government and defendants" in the Government case. But, indeed, had the petitioners themselves moved to quash the subpoena issued to Mr. Disney instead of waiting for and attempting to influence the Government's response thereto, it is probable that the Government would never have become involved here at all. And this is clearly what the Court of Appeals found to be the case. It said:

> "In our opinion, the order of November 12, 1963, is of an ancillary character as so defined, and is therefore subject to review in this court. That order, dealing with the question of whether protective orders entered years ago in a Government antitrust suit which was terminated in 1961, disposes of a controversy outside of the main stream of the litigation in the Government case. It is essentially a controversy between private parties in which the Government is not directly concerned, for although the Government made the motion to vacate the protective orders, it did so in aid of Olympic's effort to obtain access to documents which the oil companies do not wish to have released." 332 F.2d at page 263.

The cases cited by petitioners have no application here. Both *Terminal Railroad Assn. v. United States,* 266 U.S. 17 (1924) and *United States v. California Canneries,* 279 U.S. 553 (1929), involved situations where the appellate review involved "a final judgment ... wherein the United States is complainant". In both cases, the scope and application of the *final judgment* was the pivotal issue. But here, the issue did not concern itself in any way with the final judgment in the Government case. The issue below was whether or not certain protective orders entered in the course of discovery proceedings in the Government case could be enforced as a bar to compliance with a subpoena issued in purely private litigation. As the Court of Appeals found, the conflict was "outside of the main stream of the litigation in the Government case" and, as in the *Shenandoah* case, was 'ancillary' to the Government litigation. Accordingly, the first question presented by petitioner raises no issue which was not carefully considered and correctly decided by the Court below.

Petitioners' second question asks:

"Did the District Court have discretionary power to enter and continue in effect in a Government civil antitrust case protective orders which deny access by the public generally, and by a private antitrust plaintiff specifically, to pretrial documents filed by the Government?"

The question misstates the issue raised and decided below. The Court of Appeals specifically stated that it did "not regard the question of whether the pro-

tective orders were valid when entered as properly before us" 332 F. 2d at p. 264. Nor did its remand to the District Court require the entry of an order vacating the protective orders as to the public at large. Finally, even the order which the Court of Appeals directed Judge Carter to enter permits Olympic to have access to the documents subject to a further protective order if there should be contained in the documents any presently sensitive competitive information or trade secrets.

The narrow question presented to and decided by the Court of Appeals was whether or not Judge Carter had, under the circumstances of this case, power to *enforce* his protective orders against Olympic, which in its private litigation had caused to be issued a subpoena calling for documents subject to those protective orders. The Court of Appeals correctly decided that he did not. It did so in reliance upon the precedent established by this Court in *Ex parte Uppercu*, 239 U.S. 435 (1915) in which Mrs. Justice Holmes, speaking for this Court, said that similar sealing orders against a similar petitioner had "no judicial character" but were "simply an unauthorized exclusion of him by virtue of *de facto* power". 239 U.S. at p. 441.

What was really in issue before the courts below was whether petitioners were entitled to derive an advantage in private litigation by reason of the protective orders entered in the Government case. Having been charged by the Government with participation in a sweeping combination and conspiracy to restrain trade in and monopolize the oil industry in the Pacific Coast states, petitioners directed volu-

minous interrogatories to the Government to ferret out the facts on which it would rely to establish its claim for relief. Having received what they asked for, petitioners convinced the district judge that this collocation of evidence should be sealed from public scrutiny and more particularly from the eyes of any potential treble damage litigant.

Without respect to propriety of such orders when entered there is nothing, express or implied, in any Act of Congress, in any Rule of the Federal Rules of Civil Procedure, or any pronouncement of this Court which authorizes a district court judge to seal in perpetuity as against a litigant whose complaint is based upon the same alleged violations documents filed and used in a Government antitrust case.

Petitioners' argument that the ruling of the Court below prevents a district judge from entering an effective protective order in any Government antitrust case is devoid of any merit. For even here the protective order is still effective as against the public at large. Indeed, the only person in the world now entitled to review these documents is Olympic Refining Company and its counsel, and even they may be subjected, if necessary, to certain restrictions on the disclosure of the data contained in the documents.

Nor is there merit in the contention that the Publicity in Taking Evidence Act, 15 U.S.C. 30 (which the Court of Appeals used to buttress its conclusion) conflicts with the Federal Rules of Civil Procedure which permit the entry of protective orders under designated circumstances. For as we have already

pointed out the Court below did not decide that the orders were not valid when entered, or that protective orders could not be entered at all. All that the Court of Appeals decided was that the orders could not be *enforced* as a bar to compliance with a subpoena issued in purely private litigation, and it did so in reliance upon *Ex parte Uppercu*, supra. Specifically citing *Uppercu*, the Court concluded that nothing in the Federal Rules of Civil Procedure or any other statute permitted a protective order to be *enforced*, subject to further protection, against a private litigant where relevancy is shown. Thus no question of conflicting statutes or repeal by implication is involved here.

Finally, the arguments advanced by petitioners that the procedure followed by Judge Carter is in the public interest in promoting expeditious disposition of antitrust litigation is plainly wrong.

While it may be true that the disposition of Government antitrust cases by consent decree serves the public interest, it is also true that private treble-damage actions are an important component of the public interest in "vigilant enforcement of the antitrust laws." *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 329 (1955). But in encouraging consent settlements in Government litigation (Section 5, Clayton Act, 15 U.S.C. 16) nowhere did Congress, even by implication, grant a license to district judges to suppress the evidence elicited during discovery—particularly where the evidence was specifically sought by the defendant. Indeed, it is almost sham to characterize the disposition of the Government case as a "consent decree". Only after nearly 10 years of dis-

covery which produced literally thousands of pages of interrogatories and responses, and which consumed nearly 100 man years of Government time and expense, and then only after a *pre-trial* ruling that the district judge would not grant the Government the relief it sought was there a disposition of the litigation. This is not the quick capitulation Congress envisioned. Cf. *City of Burbank v. General Electric Co.*, 329 F.2d 825, at p. 835 (9th Cir., 1964). And to prevent the use of evidence elicited during discovery in such a case serves *no* purpose other than to thwart treble-damage actions and their effect on the enforcement of the antitrust laws.

The carefully considered opinion of the Court of Appeals reached the correct conclusion. There is no need for this Court to reexamine that result.

CONCLUSION

For the reasons stated herein, neither of the questions posed by petitioners merit consideration by this Court, and respondent Olympic Refining Company respectfully urges that the petition be denied in its entirety.

Dated, San Francisco, California,
August 26, 1964.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 395

THE HONORABLE JAMES M. CARTER, JUDGE OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, ET AL., PETITIONERS

v.

OLYMPIC REFINING COMPANY AND THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. xiii, R. 412–421) is reported at 332 F. 2d 260. The Findings of Fact and Conclusions of Law (R. 190–196, Pet. App. vii) and the oral opinion of the district court (R. 344–349, Pet. App. iii) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1964 (Pet. App. xiii). The petition for a writ of certiorari was filed on August 17, 1964. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

During pretrial proceedings in a government civil antitrust suit, the district court entered protective orders providing confidential treatment for answers to interrogatories that the government filed in that suit. The case was settled by a consent judgment. Subsequently, the plaintiff in a private antitrust action based upon the same violations charged in the government's suit sought access to those documents. The district court refused to vacate its protective orders, and the court of appeals reversed. The following questions are presented:

1. Whether the court of appeals, rather than this Court by virtue of the Expediting Act, had jurisdiction to review the refusal to vacate the protective orders.

2. Whether the court of appeals properly directed that the protective orders be modified to give the private antitrust plaintiff access to the documents, subject to reasonable restrictions to prevent unnecessary disclosure to others of any present trade secrets or presently sensitive competitive information in such documents.

STATUTES AND RULES INVOLVED

Section 2 of the Expediting Act of 1903, 15 U.S.C. § 29, provides:

> In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant,

an appeal from the final judgment of the district court will lie only to the Supreme Court.

The Publicity in Taking Evidence Act, 15 U.S.C. § 30, provides:

> In the taking of depositions of witnesses for use in any suit in equity brought by the United States under sections 1–7 of this title, and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable.

Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), provides:

> (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

Rule 30(b) of the Federal Rules of Civil Procedure provides:

> ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

Rule 33 of the Federal Rules of Civil Procedure provides in part:

> * * * The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

STATEMENT

This controversy arose out of the efforts of respondent Olympic Refining Co. ("Olympic"), the plaintiff in a private antitrust case, to examine documents filed by the United States in a government antitrust suit that was terminated by a consent judgment (*United States* v. *Standard Oil Co. of California,* (S.D. Cal.), Civil 11584–C). The documents are answers to interrogatories served upon the government by several major oil companies who are petitioners here.[1] These petitioners were defendants in the government suit and two of them are also defendants in Olympic's suit.

The district court (Judge Carter) had entered three protective orders in the government case. The first order, entered on September 6, 1955, pursuant to a stipulation, provided for 15 days notice to the opposing party before answers to written interrogatories previously propounded by both sides would be filed with the court; it further provided that until the documents were filed, they would be kept confidential (Pet. App. ix, R. 133–135). Thereafter the United States gave notice that it would file its answers to the defendants' interrogatories, and over the government's objections, the second order was then entered sealing the material pending further orders by the court (Pet. App. x, R. 138–139). The government's answers consist of a list of witnesses it proposed to call at the trial of the

[1] Standard Oil Company of California, Shell Oil Company, Richfield Oil Corp., General Petroleum Corporation, Tidewater Oil Company, Union Oil Company and Texaco, Inc.

case, the factual contentions supporting the government's legal theory, and a summary of the evidence upon which those contentions rested (Pet. App. x, xii). The effect of the two orders was to defer until trial resolution of the issue of whether particular material was to be kept confidential (Pet. App. xi).

On June 19, 1959, after the district judge had stated that even if the government fully proved its case he would not grant the relief requested, the government, at the suggestion of the court, entered into a consent decree, providing for more limited relief, against all of the defendants except Texaco. *United States* v. *Standard Oil Co. of California,* 1959 Trade Cases ¶ 69,399, pp. 75,552, 75,527 (S.D. Cal.). In contemplation of trying the case against Texaco, the government had moved for production of the originals of the defendants' answers to interrogatories. Upon entry of the consent decree the court granted the motion but issued the third protective order which prohibited disclosure of such answers except as necessary in the course of the trial of the case against Texaco, or upon further order of the court (R. 140-141). The government subsequently dismissed the suit against Texaco (Pet. App. xi).

Olympic had filed a complaint under the antitrust laws on February 23, 1958, against Standard Oil Company of California and General Petroleum Corporation (two of the defendants in the government's case) in the Northern District of California. The complaint alleged substantially the same violations as had the government's complaint filed in the Southern Dis-

trict of California (R. 40–58). In the Northern District, Olympic made two attempts to obtain the sealed material through motions for production of documents addressed to the defendants. In both instances these motions were denied and Judge Burke, who ruled on the second motion, suggested that Olympic obtain a release of the material from Judge Carter (R. 12). Olympic thereupon served upon the Chief of the Los Angeles Office of the Antitrust Division a subpoena demanding production of the government's copies of its answers to the defendants' interrogatories, the originals of which were held under seal by the district court (R. 144).

Because the government was barred from releasing these documents by Judge Carter's protective orders, it filed a motion to vacate those orders (R. 145–156). Judge Carter denied the motion to vacate and quashed the subpoena (Pet. App. xii). He stated that it had been possible to settle the government's case by a consent decree largely because of the complete information made available to both sides by use of discovery (Pet. App. xi), and that "[t]he existence of the orders formed an important part of the consideration which defendants obtained in entering the consent decree in said action * * *" (Pet. App. xi). The court also said that Olympic was not prejudiced because (1) it could utilize normal discovery procedures in order to obtain the same information, and (2) the government's answers contain only contentions of counsel on the facts and law of the case (Pet. App. xii).

Olympic thereupon filed a petition for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit, and the government intervened in that action in support of Olympic (see pp. 9–10, *infra*). The court of appeals reversed, and remanded the case to the district court for appropriate modifications of the protective orders (Pet. App. xxiii). It held:

1. That it, and not this Court, had jurisdiction to review the district court's refusal to vacate the protective orders (Pet. App. xvii–xviii).

2. That Olympic was entitled to have the protective orders "reconsidered as of this time, and modified in such form as to permit access to the documents subject to reasonable restrictions as to disclosure, whether or not some of the information contained in them may still be regarded as trade secrets or sensitive competitive information" (Pet. App. xxii).

ARGUMENT

1. The court of appeals correctly held that it, rather than this Court, had jurisdiction to review the district court's orders. Although the Expediting Act gives this Court exclusive jurisdiction over an appeal "from the final judgment" in any civil action brought by the United States under the antitrust laws, the Court recently held that the court of appeals rather than itself has jurisdiction over an appeal "from an ancillary order" entered in such an action determining a controversy that "is entirely between private parties and is outside the main stream of the litigation in which the Government is directly con-

cerned." *Shenandoah Valley Broadcasting, Inc.* v. *American Society of Composers,* 375 U.S. 39, 40–41. The protective orders which are the subject of this litigation are in that category.

The government case has long since been terminated by dismissal as to one defendant and entry of a consent judgment against the others. The present controversy is a dispute between the parties in a private antitrust suit relating to discovery in that suit, and the government has no direct interest in its outcome. While the government was the moving party before Judge Carter in seeking to vacate the protective orders, it did so not because it had any direct interest in eliminating them, but because those orders barred it from complying with the subpoena calling for production of the documents which the orders covered. It was Olympic, and not the government, which sought the writ of mandamus in the court of appeals seeking to reverse Judge Carter's ruling. The government's participation in the court of appeals, in which it urged that the protective orders should be vacated, was basically that of an *amicus curiae.* Since the subpoena calling for the government attorney to produce the documents had been quashed, the government had no direct interest in reversing the district court's orders. Its interest in the proceeding before the court of appeals was only in the legal proposition which it urged, namely, that an interlocutory non-disclosure order entered in a government antitrust case should not be permitted to stand where its effect would be to interfere with legit-

imate discovery efforts in a private case based upon the same violations charged in the government's suit. The government pointed out to the court of appeals that, although its interest in the case was that of an *amicus*, it was intervening because that court, in an order extending the time for filing of briefs, had authorized the United States to intervene if it wished to participate (R. 204–205). Thus the fact that the government participated in this proceeding is in no way inconsistent with the court of appeals' holding (Pet. App. xvii) that the basic controversy over vacating the protective orders was "between private parties outside the main stream of the litigation in which the Government is directly concerned."

The cases upon which petitioners rely, in which courts of appeals were held to lack jurisdiction to review orders entered in government antitrust cases, are plainly distinguishable and, indeed, are in sharp contrast to the present controversy. *Terminal R. R. Assn.* v. *United States*, 266 U.S. 17, involved an interpretation of the final decree rendered in the government action; *United States* v. *California Canneries*, 279 U.S. 553, was an effort to modify the final decree; *Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (C.A. 3) certiorari denied, 309 U.S. 687, involved an effort by a third party to intervene in opposition to the relief sought by the government; and *National Ass'n of Real Estate Boards* v. *United States*, 176 F. 2d 631 (C.A. D.C.) was an effort to appeal from the denial of a motion for

summary judgment in the government action. The issues in those cases, unlike the issue in the present controversy, were an integral part of the substantive contest between the government and the defendants.

2. The court of appeals properly directed the district court to modify the three protective orders in the government case so as to permit Olympic access to the government's answers to defendant's interrogatories in that case, subject to reasonable restrictions against unnecessary disclosure of trade secrets or sensitive competitive information. Contrary to petitioners' contention (Pet. 13–15), we do not read the opinion of the court of appeals as resting upon any general rule that a district court has no power ever to continue a protective order to bar disclosure of confidential material to the parties in another case. On the contrary, the court of appeals held only that, in the circumstances of this case, the district court's refusal to modify the protective orders was erroneous. For the court of appeals, after pointing out the grounds of the district court's decision—its findings that, "in the Government case, defendants waived objections to interrogatories, provided a fuller disclosure than might otherwise have been required of them, made possible the formulation of a consent decree, and agreed to such a decree (stipulated dismissal in the case of Texaco), all in reliance upon the entry and continuing effectiveness of the protective orders"—held: "None of these circumstances, in our opinion, support the view that these orders are not subject to modification to meet the reasonable

needs of other parties in other litigation" (Pet. App. xix).

This ruling was correct. Olympic was entitled to use the discovery procedures of the Federal Rules of Civil Procedure "to obtain the fullest possible knowledge of the issues and facts" in its lawsuit (*Hickman* v. *Taylor,* 329 U.S. 495, 501). Rules 30(b) and 33 of the Federal Rules of Civil Procedure, pursuant to which the district court originally entered the protective orders, did not, in the circumstances here shown, authorize the orders to be continued for the purpose of preventing the plaintiff in another action from obtaining discovery of the material which the orders covered. Rule 30(b) authorizes the district court to provide that "after being sealed the deposition shall be opened only by order of the court * * *," and Rule 33 makes Rule 30(b) applicable "for the protection of the party from whom answers to interrogatories are sought * * *." These provisions, which in terms merely provide for confidential treatment until further order of the court, do not give the court any blanket authority to continue indefinitely a protective order, entered in another case, which sealed answers to interrogatories because they contained trade secrets. Rather, the district court's duty, when the non-disclosure order is sought to be lifted, is to evaluate the situation as it then exists, in the light of (1) the need for the material by the parties in the other case, and (2) the injury that might result from disclosure. See 4 Moore, *Federal Practice,* 2034 (2d ed., 1950).

Where, as the court of appeals here held (Pet. App. xxii), the party in the other suit had a need for the material, and there was no showing that its disclosure to that party would cause serious injury, modification of the order to permit disclosure was proper, subject to appropriate terms and conditions upon use of the material.[2] The court of appeals applied that standard here. It remanded to the district court to modify the protective orders "in such manner that Olympic may have access to the documents in question for use in the Olympic case, subject to such reasonable restriction as may be necessary and practicable to prevent unnecessary disclosure of any present trade secrets or presently sensitive competitive information that may be contained in such documents" (Pet. App. xxiii).

The fact that the government case was terminated by a consent judgment did not justify the district court in continuing the protective orders. The con-

[2] This conclusion is supported by the basic policy of the Publicity in Taking Evidence Act, 15 U.S.C. 30. That Act provides that in the taking of depositions for use in any government civil antitrust suit "the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable." As the court of appeals correctly ruled (Pet. App. xix-xx): "While this statute does not expressly apply to the acquisition of information by means of interrogatories or subpoenas duces tecum, the policy behind the enactment is equally applicable to these forms of discovery." The basic policy of the Act was to make available for public scrutiny all information obtained by the parties in government civil antitrust suits (see H. Rep. No. 1356, 62d Cong., 3d Sess., p. 2; 49 Cong. Rec. 2511-2514) and not merely, as petitioners argue (Pet. 15-16) evidence obtained in such suits.

sent judgment contained no provisions which, expressly or impliedly, barred disclosure of the documents. Nor did the district court find that the government agreed to continue the protective orders indefinitely. The only benefit which petitioners can claim from the consent judgment is that, by not having gone to trial, the judgment cannot be used against them by private plaintiffs as *prima facie* evidence of the violations established in the government suit, as would be the case under Section 5(a) of the Clayton Act had testimony been taken. But neither the language of Section 5 nor its policy of encouraging consent judgments indicates that it gives a consenting defendant the additional benefit of suppressing information which would otherwise be available to other litigants who had need of it. Such a result would hamper the "vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action." *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 329.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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